

# Healthcare Law Alert – CMS Finalizes New Rule Affecting Nursing Homes That Participate In Medicare and Medicaid

On September 28, 2016, the Centers for Medicare & Medicaid Services (CMS) issued a final rule making major changes to the requirements for long-term care facilities that participate in the Medicare and Medicaid programs. The final rule is the first major change in the conditions of participation since 1991.

CMS reports that the changes are intended to reduce unnecessary hospital readmissions and infections, improve the quality of care, and strengthen safety measures for long-term facility residents. In particular, the rule requires long-term care facilities that participate in Medicare or Medicaid to adopt best practices for resident care, implement important safeguards and include additional protections required by the Affordable Care Act. CMS received nearly 10,000 public comments, which were considered in finalizing this rule.

The changes in the conditions of participation are significant. Broadly speaking, the changes affect:

- Resident's rights and include a new prohibition on the use of pre-dispute binding arbitration agreements;
- Staff training requirements with respect to dementia and elder abuse;
- Staffing requirements;
- Quality of life standards;
- Care planning, including discharge planning;
- Increased authority and role for dietitians and therapy providers in providing care under certain circumstances; and
- Infection prevention and control requirements, including a new requirement for facilities to appoint an infection prevention and control officer and adopt an antibiotic stewardship program that includes antibiotic use protocols and a system to monitor antibiotic abuse.

The final rule will be implemented in three phases, with the first deadline quickly approaching on November 28, 2016. The following are some examples of changes that long-term care facilities must implement by November 28, 2016:

## **Ban on Arbitration Agreements**

On November 28, 2016, the use of pre-dispute arbitration agreements are banned entirely. The goal of this change, as CMS Administrator Andy Slavitt stated in a blog post is to, "strengthen the rights of residents and families in the event that a dispute arises with a facility." Thus, binding, pre-dispute arbitration agreements, even if optional, cannot be used by nursing homes after Phase 1 of the rule is implemented on November 28, 2016.

## **Quality Assurance and Performance Improvement Programs**

The final rule revises the requirements for Quality Assurance and Performance Improvement (QAPI) programs. Skilled nursing facilities must now adopt and implement a written plan that meets certain standards. The new rule also allows for disclosures of QAPI documents to surveyors in order to ensure that facilities have effective QAPI programs. The final rule reinforces the privileged status of QAPI records and states that its “purpose is neither to inappropriately make documents public nor [] expose facilities to litigation risk.” This section will be implemented in Phase 1, with a number of substantive provisions delayed until Phase 2 or 3 in 2017 and 2019.

## **Food and Nutrition Services**

Skilled nursing facilities must provide each resident with a “nourishing, palatable, well-balanced diet that meets his or her daily nutritional and special dietary needs, taking into consideration the preferences of each resident.” This includes sufficient food and nutrition staff, a qualified dietitian, and other specific requirements for feeding and nutrition. Most of these requirements must be in place by Phase 1 in 2016.

## **Comprehensive Person-Centered Care Planning**

Skilled nursing facilities must adopt a discharge planning process that focuses on each resident’s specific discharge goals, and prepares the resident to be active in post-discharge care, with the stated goal of reducing readmissions and hospital admissions. This quality-of-care emphasis implements discharge planning requirements mandated by the 2014 IMPACT Act, and will be implemented in Phase 1.

New York skilled nursing facilities should review the final rule and current to identify what, if any, immediate steps are necessary to ensure compliance with the conditions of participation.

The final rule is available on the Federal Register at <https://www.federalregister.gov/public-inspection>.

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